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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-754
Consolidated with
No. 73-918

RAYMOND K. PROCUNIER, ET AL.,
Appellants,
vs.
BOOKER T. HILLERY, JR., ET AL.,
Appellees.

EVE PELL, ET AL.,
Appellants,
vs.
RAYMOND K. PROCUNIER, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

BRIEF AMICUS CURIAE FOR CHICAGO TRIBUNE COMPANY

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BRIEF AMICUS CURIAE FOR CHICAGO TRIBUNE COMPANY

May It Please the Court:

This amicus brief is submitted on behalf of the Chicago Tribune Company in support of the proponents of access to prison information. Consent to the filing of this brief has been obtained from both the appellants and appellees pursuant to Rule 42(1).

STATEMENT OF INTEREST

Amicus Chicago Tribune Company is the publisher of the *Chicago Tribune*, one of the nation's largest daily and Sunday newspapers; the *Chicago Tribune* has a well-established tradition of appearing before this Court in litigation concerning the public's right to be informed through a free, unfettered press. See *e.g., Miami Herald Publishing Co. v. Tornillo*, No. 73-797 (now here on appeal from the Florida Supreme Court); *Associated Press v. Walker*, 388 U. S. 130 (1966); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964); *Near v. Minnesota*, 283 U. S. 697 (1930).

The claim has been made and convincingly documented that penal conditions in the United States have become "essentially invisible." See *The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice*, 159 (1967). The *Chicago Tribune* believes that the press and the public are entitled to reasonable access to information relating to prisons, prisoners, and the problems of both; the First Amendment requires no less if freedom of the press is to remain robust.

We accordingly submit this amicus brief in support of the proponents of access to prisoners and prison information.

ARGUMENT

I. Prison Conditions and the Treatment of Inmates Are the Public's Business.

The 1974 philosophy of prisons, punishment and penology centrally emphasizes humane treatment of prisoners and their rehabilitation; today's viewpoint is in marked contrast to early attitudes toward prisoners and penology.[1] Nevertheless and despite this enlightened attitude, there appears to be a growing

1. Originally, dungeons and prisons, such as the Tower of London, were used for the incarceration of royalty and the rich; poor offenders were simply publicly punished, tortured or executed.

inability to solve the problems of prison administration and control, the environment in prisons, and the reformation and return to society of those incarcerated.

Every informed citizen and newspaper editor is aware of such tragic incidents as:

—The Attica Riot, September 9-13, 1971. 43 New York citizens died; 80 others were wounded in the retaking of the prison.

—The Rahway, New Jersey, State Prison Riot, November 24, 1971. Six guards were injured; the warden was taken as a hostage.

—The Walpole, Massachusetts, State Prison Riot, March 17-19, 1972. Five inmates and two guards were injured.

—The Patuxent State Prison Riot, Jessup, Maryland, May 22, 1972. Seven guards were injured.

—The Menard State Prison Riot, Joliet, Illinois, January 11, 1973. During the week-long disturbance, one guard was attacked and killed.

—The Oklahoma State Prison Riot, McAlester, Oklahoma, July 28-August 1, 1973. At least four prisoners were killed.

Mitford, *Kind and Usual Punishment,* 30-31 (1973). Thus, places for long confinement of criminals were unnecessary. The type of penal institution existing in this country today was an American innovation of the early 19th Century, designed and intended to abolish the barbarities of corporal punishment. See *Attica: The Official Report of the New York State Special Commission* 6-7 (1972). Nevertheless, the public attitude toward prisoners was markedly different one hundred years ago than it is today. In 1871, a prisoner was considered "a slave of the State" with no enforceable constitutional rights, *Ruffin v. Commonwealth,* 62 Va. (21 Gratt.) 790, 796 (1871). By 1972, the public's attitude had moved so far from this view that one court was prompted to say:

> "I am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the U. S. as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational." *Morales v. Schmidt,* 340 F. Supp. 544 (W. D. Wis. 1972).

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Each of these tragic incidents received vast coverage in the news media; the Court, we think, can take judicial notice of this extensive press coverage and the nationwide interest in the incidents. *See, e.g., Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245, 1251 (3d Cir. 1971), *cert. denied* 404 U. S. 883 (1971); *Fox v. City of West Palm Beach*, 383 F.2d 189, 195 (5th Cir. 1967). All of these unfortunate episodes resulted in charges and countercharges concerning the causes of the riot, the means by which it was quelled, the steps necessary to prevent a recurrence, and the disciplinary action taken against those inmates allegedly involved in causing or participating in the riot. In many cases, the incidents were of such intense interest and public concern that they prompted official investigations and voluminous published reports. See *Attica: The Official Report of the New York State Special Commission* (1972). Moreover, in addition to the intense public interest in prison riots and uprisings, there has been widespread discussion and debate concerning the entire subject of modern penology. The libraries of the nation abound with such material. See, *e.g.*, Mitford, *Kind and Usual Punishment* (1973); American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America* (1971); Rothman, *Discovery of the Asylum* (1971); Melville, *Letters from Attica* (1972); Menninger, *The Crime of Punishment* (1969); Zimmerman, *Punishment Without Crime* (1964).

In sum, we believe that all parties to this litigation will freely admit that penal institutions, their inmates, and the attendant problems are matters of acute public and social interest. Thus, and beyond peradventure, correctional institutions and their operation present a compelling example of the kind of subject that is most appropriate for the debate and dialogue that have long been encouraged and protected by the First Amendment as construed and applied by this Court. *E.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412

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U. S. 94, 112 (1973); *Rosenbloom v. Metromedia*, 403 U. S. 29, 43-44 (1971); *Watts v. United States*, 394 U. S. 705, 708 (1969); *Lamont v. Postmaster General*, 381 U. S. 301, 307 (1965); *Linn v. Plant Guard Workers*, 383 U. S. 53, 62 (1966); *New York Times v. Sullivan*, 376 U. S. 254, 270 (1964). *See also Terminiello v. Chicago*, 337 U. S. 1, 4 (1949).

II. Press Access vs. Maintenance of Institutional Order.

Clearly, one of the most appropriate and traditional means of informing the public of prison conditions, problems and proposed improvements is the news media. *See, e.g., New York Times Co. v. United States*, 403 U. S. 713, 717 (1971) (Black, J., concurring); *Mills v. Alabama*, 384 U. S. 214, 219 (1966). Equally plain is the fact that the news media cannot so inform the public without reasonable access to accurate and timely information obtained through objective investigative reporting. Indeed, however, well intentioned and dedicated persons responsible for administration and control of the penal system may, for motives they believe laudable, conceal or distort embarrassing or depressing conditions; if such administrators are inefficient or corrupt they will *a fortiori* conceal the truth.

On the other hand, we also recognize and freely concede that no penal institution, regardless of how modern or enlightened, can function without discipline, order and security. It is thus readily apparent that unlimited access to penal institutions by the press or any interested segment of society could at best be unworkable and at worst dangerous to security. But, especially in the area of "preferred" First Amendment rights, *United States v. C. I. O.*, 335 U. S. 106, 141 (1947) (Rutledge, J., concurring), this Court has traditionally balanced conflicting rights and considerations in such fashion as to give vitality to all interests without sacrificing one at the expense of another. *See, e.g., Sheppard v. Maxwell*, 384 U. S. 333 (1966); *Konigsberg v. State Bar of California*, 366 U. S. 36, 50-51 (1961); *Watkins v. United States*, 354 U. S. 178, 197-98 (1957).

We think a rational compromise of the competing interests herein could be effected by the Court's declaration of the following First Amendment guidelines concerning access to prisoners and penal institutions:

The press should be given access to penal institutions:

a) When a prisoner, within the bounds of reason and common sense,[2] requests an interview by the press, the interview should be allowed; and

b) When a newsworthy happening, *i.e.*, an event of public interest,[3] occurs involving a correctional institution (within the limits of safety).

We respectfully submit that the above constitutional guidelines would accommodate the need to allow the press to obtain information about the operation of an important governmental operation and an ever increasing social problem, and at the same time permit the orderly operation of penal institutions.

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2. A prisoner's request to be interviewed daily would be beyond the bounds of reason and common sense. The lower courts should have no difficulty developing an appropriate yardstick once this Court has spoken in developing a standard of reasonableness, if needed.

3. The term "newsworthy event" has a well-established meaning in law. See, *e.g.*, *Briscoe v. Reader's Digest Association*, 4 Cal. 3d 529, 541, 483 P. 2d 34, 43 (1971); *Time v. Hill*, 385 U. S. 374 (1967); *Cantrell v. Forest City Publishing Co.*, 484 F. 2d 150 (6th Cir. 1973); *Goldman v. Time, Inc.*, 336 F. Supp. 133 (N. D. Cal. 1971).

Some examples of newsworthy events in relation to penal institutions are legislative investigations, reports of the prestigious John Howard Association, a riot, unexplained inmate deaths.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should direct the courts below to dispose of this cause in accordance with the principles set forth in this brief.

Respectfully submitted,

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